

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

(42369)

ORIGINAL

77-6119

To be argued by
LEONARD KOERNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

BERALDINE L. ACHA and ARLENE M. EGAN, each
individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

—against—

ABRAHAM D. BEAME, individually and in his capacity
as Mayor of the City of New York, MICHAEL J.
Codd, individually and in his capacity as Police Commissioner of the New York City Police Department and
THE CITY OF NEW YORK, as a public employer,

Defendants-Appellees.

On Appeal from the United States District Court for
The Southern District of New York

APPELLEES' BRIEF

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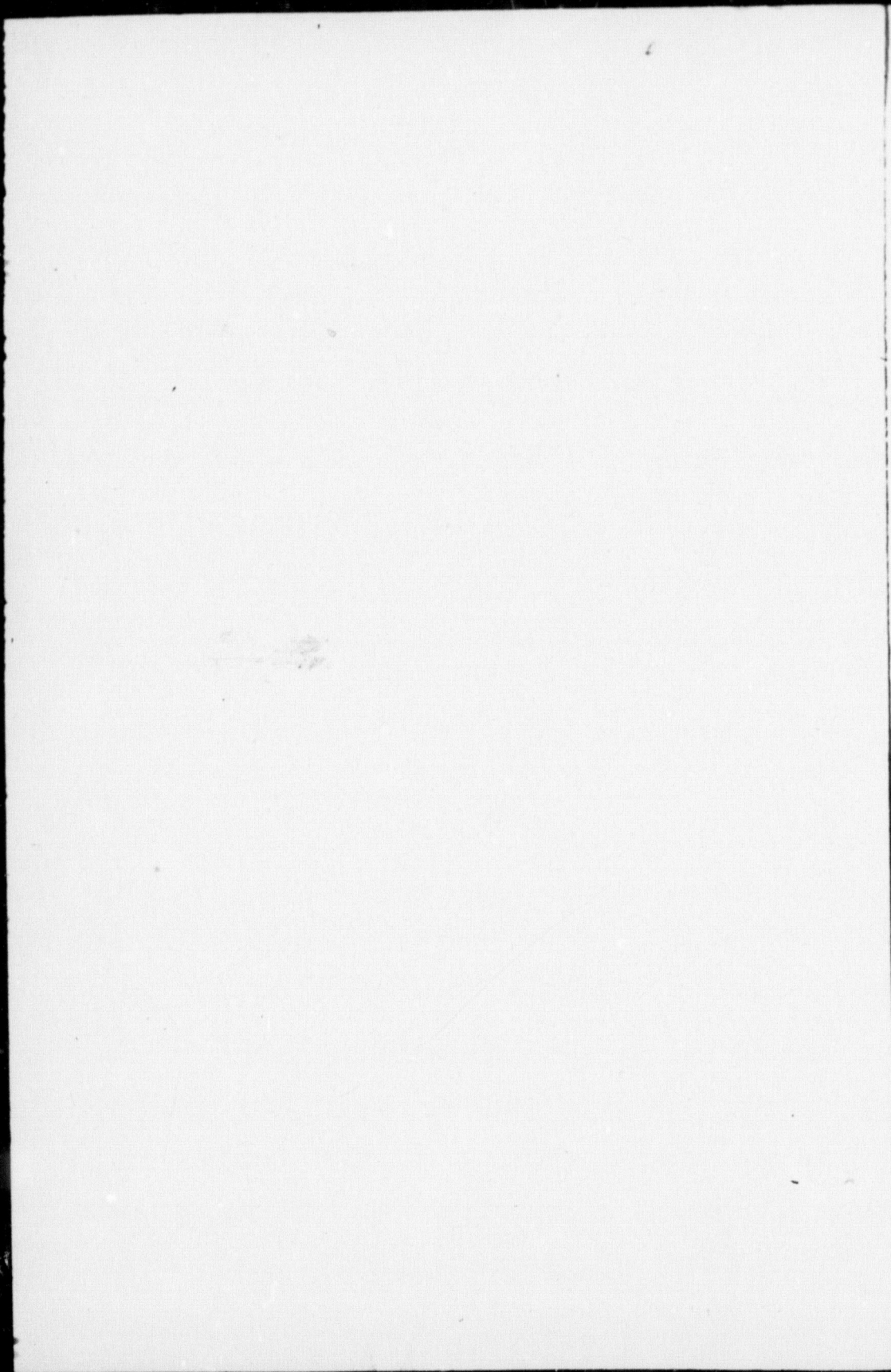


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**On Appeal from the United States District Court for
The Southern District of New York**

APPELLEES' BRIEF

Statement

The plaintiffs, laid-off female police officers of the New York City Police Department, appeal from an opinion and order of the United States District Court for the Southern District of New York (Duffy, J.), dated July 28, 1977, denying plaintiff's application for an injunction

on behalf of eleven class members, and modified injunctions previously granted on behalf of approximately 61 class members.

On August 16, 1977, this Court granted plaintiffs a stay pending the disposition of the appeal and ordered that the appeal be heard on an expedited schedule.

Questions Presented

Pursuant to this Court's decision in *Acha v. Beame*, 531 F. 2d 648 (2d Cir., 1967), on remand, plaintiffs moved for partial summary judgment on behalf of 54 class members. In reliance on this Court's opinion in *Acha, supra*, and the decision of the Seventh Circuit in *Evans v. United Air Lines*, 534 F. 2d 1247 (7th Cir., 1976), the District Court by opinion and order dated July 16, 1976 granted plaintiffs' motion for partial summary judgment on behalf of 38 class members. The judgment, entered on August 4, 1976, granted the 38 class members revised seniority dates to a date not later than May 8, 1970 and enjoined defendants from rehiring from a seniority roster which did not reflect the revised seniority dates. The District Court specifically did not determine the claims of those 38 class members for back pay, reinstatement and retroactive pension contributions. The District Court certified the partial summary judgment as final under Rule 54(b), Fed. R. Civ. P. The defendants filed a notice of appeal but the appeal was not perfected and was dismissed by this Court.

On May 31, 1977, the Supreme Court issued decisions in *International Brotherhood of Teamsters v. United States*, — U.S. —, 97 S. Ct. 1843 and *United Air Lines v. Evans*, — U.S. —, 97 S. Ct. 1885. On June

15, 1977, defendants submitted a motion to the District Court to vacate the partial summary judgment and injunctive relief granted on behalf of the 38 class members on the basis of the two supervening decisions of the Supreme Court. By opinion and order dated July 28, 1977, the District Court granted the motion and vacated the partial summary judgment. It also modified the permanent injunction to a preliminary injunction.

The following questions are presented for review:

1. Is a partial summary judgment of the District Court on behalf of 38 class members which did not determine their claims for back pay, reinstatement and retroactive pension contributions and did not completely determine their claims for constructive seniority certifiable as a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure?
2. If the partial summary judgment was properly certified under Rule 54(b), was it an abuse of discretion for the District Court, based on new law as established by *Teamsters* and *Evans*, to vacate the judgment?
3. Were the layoffs of female police officers discriminatory, within the meaning of the decisions of the Supreme Court in *Teamsters* and *Evans*, under Title VII or 42 U.S.C. § 1983 because they perpetuated the effects of pre-Act and/or post-Act discriminatory hiring practices?

Facts

(1)

On June 26, 1975, plaintiffs, female police officers in the New York City Police Department (hereinafter the "PD"), commenced a class action on behalf of all female

police officers who were to be laid off on or about June 30, 1975 under federal civil rights laws, Title VII, 42 U.S.C. §2000 *et seq.* and 42 U.S.C. §1983. The action sought to enjoin the Police Department from terminating them from the force. The complaint alleged that the layoffs pursuant to Section 80 of the New York Civil Service Law were discriminatory in that they perpetuated the effects of past discriminatory hiring practices (A. 10).*

Plaintiffs' class consists of approximately 437 female police officers who, because of a fiscal crisis necessitating severe budget cuts, were laid off or noticed for layoff by the PD effective June 30, 1975 (A. 304). Approximately 5000 male police officers were also laid off or noticed for layoff (A. 269). All the layoffs were made in the inverse order of seniority in the position of Police Officer pursuant to Section 80 of the New York Civil Service Law. All officers who were appointed to the PD in or after March, 1969 were terminated on June 30, 1975 (A. 67).

Prior to 1973, separate examinations were administered to males and females for the positions of Policewoman and Patrolman/Trainee. Between 1964 and 1969, two examinations were given for the position of Policewoman. During that same period, approximately 17 examinations were given for the positions of Patrolman/Trainee (AD. 43).

Of the 437 class members, approximately 399 had taken Examination No. 9081 for the position of Policewoman given in October, 1969. The remaining 38 class mem-

* Unless otherwise indicated, numbers preceded by A refer to pages in the Joint Appendix. Numbers preceded by the letters AD refer to pages in the Addendum to Plaintiffs-Appellants' Brief.

bers had taken Examination No. 9986 for the position of Policewoman given in March, 1964, and were appointed to the PD in or about 1969 (AD. 43).

Between 1970 and 1973 there was a job freeze in the PD. During this period there were no appointments to the positions of Patrolman and Policewoman, but males who had passed Examination No. 9080 for Trainee were appointed on May 8, 1970 to fill 125 vacancies existing at that time. These trainees ripened into Patrolmen during the freeze period upon reaching age 21. No other appointments from Examination Nos. 9080 or 9081 were made until 1973 (A. 275).

In January 1973, the job freeze was lifted and hiring resumed at an accelerated pace (A. 486). There were then eight eligible lists in existence from which appointments were to be made, including the lists from Exam. Nos. 9080 and 9081, and one was established from an exam administered to males in August 1970, after Exam. Nos. 9080 and 9081 (A. 548-50).

All females from Exam. No. 9081 who were qualified and available were appointed during 1973 (A. 486). Indeed, 227 females were appointed from Exam. No. 9081 before any males were appointed from Exam. No. 9080 or the subsequent list. The median appointment date for females from List No. 9081 was July 30, 1973, while the median date for males from List No. 9080 was October 1, 1973 (A. 486, 549-50).

Beginning in 1972, female officers were given patrol assignments. Thereafter, commencing January, 1973, female officers were given qualifying examinations, training, and assignments identical to that given to males (A. 486).

In February 1973, the budget lines for the positions of Policewoman and Patrolman were merged into a single

line (A. 486; AD. 67-68). In April 1973, the positions of Patrolman and Policewoman were merged into the position of Police Officer by order of the Police Commissioner (A. 486; AD. 69). In December 1973, a single examination was administered to males and females for the position of police officer with appointments to be made from a single eligible list without regard to sex (A. 487).

(2)

On June 25, 1975, the named plaintiffs filed charges with the Equal Employment Opportunity Commission (hereafter "EEOC") and the New York City Commission on Human Rights (A. 30-45). On June 26, 1975, plaintiffs commenced this action (A. 10). Plaintiffs claimed that, had examinations for patrolman and police trainee given between 1964 and 1969 been open to women, plaintiffs would have taken such examinations and therefore would have accrued sufficient seniority to withstand the layoffs in 1975 (A. 10).

A hearing on plaintiffs' application for a preliminary injunction enjoining the layoffs was held on June 30, 1975. At the conclusion of the hearing, the City moved to dismiss the complaint for failure to state a cause of action (A. 73).

On July 1, 1975, the District Court denied the application for a preliminary injunction and dismissed the complaint (A. 102). On August 28, the District Court signed a judgment dismissing the action (A. 118). The Court, citing *Jersey Central Power & Light Co. v. Local Union 327, etc.*, 508 F.2d 687 (3rd Cir., 1975), *cert. den.* 425 U.S. S.Ct. 998 (1976), and *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir., 1974), *cert. den.* 425 U.S. 997

(1976), found that the layoffs were the result of a facially neutral seniority system and therefore protected from challenge by §703(h) of Title VII. It further held that to grant the relief requested would violate §703(j) of the Act which prohibits an employer from granting preferential treatment on the basis of sex. 401 F. Supp. 816 (1975).

Plaintiffs appealed from the judgment of the District Court (A. 119). On February 19, 1976, this Court reversed the determination of the District Court. 531 F.2d 648 (1976). In remanding the matter to the District Court, this Court stated (p. 655):

"Until the past discrimination against these particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered 'bona fide' and in fact represents a continuation of past intentionally discriminatory practices, and thus falls outside the terms of Section 703(h)."

This Court also stated (p. 654):

"If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand current layoffs, then her layoff violated section 703(a) (1) of Title VII, 42 U.S.C. §2000e-2(a)(1), since it is based on sexual discrimination."

(3)

On remand to the District Court, plaintiffs moved, on May 27, 1976, for class certification and for summary judgment and injunctive relief on behalf of 54 class members which members plaintiffs claimed were indisputably en-

titled to sufficient constructive seniority as would place them back on the force (A. 184-264, 279-303). Defendants cross-moved on July 9, 1976 for summary judgment on the grounds that: (1) the facially neutral seniority system pursuant to which plaintiffs were laid off is immunized from challenge by Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), even though it may have perpetuated the effects of discriminatory hiring practices which occurred prior to the effective date of Title VII; and (2) even, assuming, arguendo, that plaintiffs were the victims of discrimination until the date they were hired in 1973, plaintiffs failed to file a timely charge based thereon with the EEOC under 42 U.S.C. §2000e-5(e) and are therefore barred by the statute of limitations (A. 265-78).

By opinion and order dated July 16, 1976, the District Court granted plaintiffs' motions for class certification and partial summary judgment and injunctive relief for 38 women who had taken Examination No. 9081 given the same day the identical examination, No. 9080, was given to males, and who, but for their sex, would have been appointed as police trainees on May 8, 1970 (A. 304-11).

In denying defendants' cross-motion for summary judgment, Judge Duffy relied exclusively on the decision of the United States Court of Appeals for the Seventh Circuit in *Evans v. United Air Lines*, 534 F. 2d 1247 (7th Cir. 1976) [reversed by the Supreme Court in 97 S. Ct. 1885 (1977)] and held that plaintiffs' allegations of discrimination were continuing in nature and, therefore, not barred by the statute of limitations. In finding a continuing violation, Judge Duffy rejected defendants' contention that the alleged underlying discriminatory hiring practices occurred prior to the amendment of Title VII in 1972 and therefore Title VII could not be applied retroactively to remedy the pre-Act discrimination.

That judgment based on the opinion of the District Court granted the 33 class members revised seniority to a date not later than May 8, 1970, subject to further modification after hearings before the Special Master on their entitlement to earlier seniority dates. It specifically did not determine plaintiffs' claims for back pay, reinstatement and retroactive pension contributions.

The District Court also certified the judgment as final within the meaning of Rule 54(b) of the Federal Rules of Civil Procedure. Defendants filed a notice of appeal from the District Court judgment entered on August 4, 1976 (A. 319). Defendants subsequently attempted to withdraw the appeal by letter. However, because no stipulation was filed withdrawing the appeal, this Court dismissed the appeal for failure to docket by order dated October 7, 1976 (A. 322).

Pursuant to direction of this Court, Judge Duffy appointed a Special Master to determine which class members would have taken earlier examinations for appointment to the PD had they been available to females and therefore would have accrued sufficient seniority to withstand the layoffs (A. 304). To date, the Special Master has held approximately 150 hearings on the claims of individual plaintiffs. She has rendered five interim reports containing findings as to 75 class members, of which 44 have been found entitled to some retroactive seniority, as early as 1964 and as late as 1973 (A. 323, 400, 488, 504, 553).

Those plaintiffs found entitled to retroactive seniority in the first and second interim reports of the Master which were confirmed by the District Court (A. 465) have been reinstated based on their constructive seniority dates in hirings which have taken place over the course of the past year. Additionally, the 38 women granted

partial summary judgment by the District Court were also reinstated based on a May 8, 1970 constructive seniority date (AD. 30).

In the third, fourth and fifth interim reports, the Special Master found eleven women entitled to constructive seniority. As to these women, the District Court confirmed the Special Master's findings of fact, but remanded for new conclusions (A. 582). Therefore, since these women have not been found entitled to constructive seniority, no injunction issued and they were not reinstated.* It is these eleven class members on whose behalf plaintiffs sought a stay pending this appeal.

Each of the hearings before the Special Master have solely concerned defendants' hiring practices through 1969. No plaintiff has, to date, adduced any evidence that she was the victim of discrimination after the effective date of Title VII and within the statute of limitations' period either under Title VII or 42 U.S.C. § 1983. Each of the findings of the Special Master granting plaintiffs' class members constructive seniority has been predicated solely upon a finding that the particular claimant would have, but for her sex, taken an examination before 1969 for appointment to the Police Department (A. 323, 400, 488, 504, 553).

(4)

On June 15, 1977, defendants submitted a motion pursuant to Rules 56 and 60(b) of the Fed. R. Civ. P. for relief from the partial summary judgment entered on August 4, 1976 and the subsequent orders confirming the

*Three of the eleven women have subsequently been reinstated based on their original appointment dates (A.D. 74).

findings of the Special Master granting plaintiffs' class members constructive seniority, and renewing their prior cross-motion for summary judgment, based on the recent intervening decisions of the United States Supreme Court in *International Brotherhood of Teamsters v. United States*, 97 S. Ct. 1843 (May 31, 1977) and *United Air Lines v. Evans*, 97 S. Ct. 1885 (May 31, 1977) (A. 478-87, 539-52).

Plaintiffs opposed defendants' motion and moved for confirmation of the findings of the Special Master in the third, fourth and fifth interim reports granting eleven women constructive seniority and an injunction against further hirings by the Police Department unless the seniority roster reflected the constructive seniority of those eleven class members (A. 522-38, 569-81).

By opinion and order dated July 28, 1977, the District Court granted defendants' motion to vacate the partial summary judgment entered August 4, 1976, and remanded to the Special Master for new conclusions the claims of those class members which the Master had previously granted. The Court further denied defendants' motion for summary judgment without prejudice to renewal and denied plaintiffs' application for an injunction requiring the rehiring of the eleven women found by the Special Master to be entitled to constructive seniority (A. 582-606). It is this order which is the subject of the instant appeal.

By notice of appeal dated August 2, 1977, plaintiffs appealed from so much of the order of the District Court which denied plaintiffs' motion for an injunction and modified the injunctions previously entered by the District Court (A. 607).

On August 2, 1977, plaintiffs moved in the District Court for an order staying the intended rehiring of ap-

proximately 400 police officers scheduled for August 5, 1977 pending this appeal unless the eleven class members were included in such rehiring. On August 4, 1977, Judge Duffy granted the motion to the extent that he ordered defendants to hold 11 positions open until August 16, 1977, the return date of plaintiffs' motion for a stay in this Court (A. 610). On August 16, 1977, this Court continued the stay entered by the District Court to the date of argument of this appeal.

Opinion Below

In granting defendants' motion pursuant to Rule 60(b) to vacate the partial summary judgment, the District Court considered and rejected plaintiffs' contentions that the application was untimely and barred by principles of *res judicata*. Judge Duffy held (A. 588-589):

"[T]he purpose of Rule 60(b) is to provide relief from judgments which have become final.

Rule 60(b) permits a court to relieve a party from a final judgment on the ground of '(1) mistake . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.' Such a motion must be made within a reasonable time and, if sought under subdivision one, made within one year. Plaintiffs urge that a 'reasonable time cannot exceed the time allowed for filing a notice of appeal. See *Schildhaus v. Moe*, 335 F.2d 529 (2d Cir. 1964); Moore's *Federal Practice* ¶60.27[1]. No such limitation appears in the rule. Whatever the merits of the suggested construction of the phrase 'rea-

sonable time' might be in other contexts, they do not apply here since this Court is exercising active and continuing jurisdiction over the suit, and particularly since no complete final judgment has been entered. . . .

Thus, reaching the question of whether there are appropriate grounds for relief from the judgment, I find that such relief is wholly proper. In fact, to do otherwise might create the anomalous situation in which the first 38 women reinstated pursuant to the grant of partial summary judgment would not be affected by *Evans* and *Teamsters*, but those reinstated thereafter in March 1977, would be."

Judge Duffy held, based upon *Teamsters*, that plaintiffs may not predicate a Title VII claim upon the layoffs in June, 1975, although they may have perpetuated the effects of pre-Act discrimination, i.e., the administration of separate examinations for males and females.

"Pre-Act discrimination which is perpetuated by a neutral seniority system is immunized from Title VII attack by reason of section 703(h). 45 U.S.L.W. at 4512-14. To fall outside the immunity afforded to a bona fide seniority system, plaintiffs must show more than the system's failure to correct pre-Act discrimination." (A. 594).

The District Court further held that, based upon *Evans*, the failure to credit plaintiffs herein with constructive seniority to remedy the alleged pre-Act discrimination does not constitute a continuing wrong under Title VII (A. 590), and plaintiffs must, therefore, demonstrate some independent discriminatory hiring practice which occurred

within 300 days prior to the filing of charges in the E.E.O.C. on June 25, 1975 in order to set forth a viable claim under Title VII. The Court stated (A. 594-595):

Thus, the June 1975 layoffs pursuant to a facially neutral seniority system were immunized and cannot be the basis for a Title VII violation. Therefore, plaintiffs are effectively restored to their pre-summary judgment status and to succeed must establish a *prima facie* case of a Title VII violation which occurred after the effective date of the Act and within the period of the statute of limitations. Thereafter, any class member who was not hired until after March 24, 1972 and, but for her sex would have been hired earlier than her actual appointment date is entitled to a seniority revision.

Additionally, Judge Duffy rejected plaintiffs' contention that the *Teamsters* decision is not applicable to claims against municipalities under the 1972 Title VII amendment and held that any plaintiff who successfully meets the standards set forth above may be awarded constructive seniority to a date not earlier than March 24, 1972, the effective date of the Act (A. 593, 595), a date which would not have been sufficient to withstand the layoffs. (A. 67).

In accordance with the principles set forth above, the District Court found that substantial factual disputes were raised as to the following issues and therefore referred them for trial: (1) whether any class member was the victim of hiring discrimination in violation of Title VI within 300 days prior to June 25, 1975; (2) whether any class member was the victim of intentional hiring discrimination after June, 1972, three years prior to the commencement of this action, and within the terms of office of

defendants Beame and Codd, in violation of 42 U.S.C. §1983; and (3) whether the layoffs constituted an independent discriminatory act in that it was improper to lay-off males and females from a single seniority list. Additionally, the District Court granted plaintiffs leave to amend their complaint to allege that one of the class members, Ms. McCain, had filed a charge of sex discrimination with the EEOC in September 1973, subject to defendants' raising the defenses of statute of limitations and laches.*

Applicable Statutes

TITLE VII OF THE CIVIL RIGHTS ACT

42 U.S.C. §2000e-2

* * *

"Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment

* Those matters (included in the second amended complaint filed after the institution of this appeal) are not properly raised by appellants in their brief. The District Court, not appellant, is the arbiter of whether factual disputes exist and they must be resolved in the first instance in that Court. Although irrelevant, we will discuss appellants' arguments briefly herein. The only issue before this Court is whether the partial summary judgment and subsequent orders for injunctive relief were properly vacated and modified by the District Court. That issue involves consideration only of the grounds upon which the District Court granted the partial summary judgment and whether the District Court properly found that those grounds are no longer valid in view of the decisions of the Supreme Court in *Teamsters* and *Evans*.

practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality or production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."

42 U.S.C. §2000e-5

* * *

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with

a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

FEDERAL RULES OF CIVIL PROCEDURE

Rule 54

* * *

"(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as

to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Rule 60

* * *

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation

of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not effect the finality of a judgment or suspend its operation.

* * *

McKINNEY'S NEW YORK CIVIL SERVICE LAW

Section 80

"Suspension or demotion upon the abolition or reduction of positions.—1. Suspension or demotion. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter, provided, however, that the date of original appointment of any such incumbent who was transferred to such governmental jurisdiction from another governmental jurisdiction upon the transfer of functions shall be the date of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction from which such transfer was made. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the com-

petitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents
 * * *

POINT I

The partial summary judgment which did not award the plaintiffs their entire claim for relief was not final and could not be certified by the District Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Assuming, *arguendo*, that the judgment could be certified, the District Court properly considered and granted the motion to vacate the partial summary judgment in view of the change in law as a result of the subsequent decisions of the Supreme Court in *International Bro. of Teamsters v. United States*, 97 S. Ct. 1843 (1977) and *United Air Lines, Inc. v. Evans*, 97 S.Ct. 1885 (1977).

(1)

Appellants seek to have this Court reinstate the partial summary judgment entered August 4, 1976 and subsequent orders of the District Court granting certain class members constructive seniority on the grounds that the District Court certified the partial summary judgment as final under Rule 54(b), Fed. R. Civ. P. and defendants failed to prosecute an appeal therefrom. They contend that the judgment is *res judicata* of the claims presented

by all class members and that Rule 60(b) cannot be invoked to vacate that judgment after the time for appeal has expired even though subsequent decisions of the Supreme Court completely change the law upon which the judgment was predicated.

The partial summary judgment was not final within the meaning of 28 U.S.C. §1291 and therefore was not properly certified under Rule 54(b). An interlocutory judgment may be vacated or modified by the District Court at any time until the entry of final judgment. Even assuming, *arguendo*, that the judgment was final and properly certified, Rule 60(b) specifically authorizes the vacatur of a final judgments which is necessarily *res judicata* of the matters presented therein. Where decisions of the Supreme Court substantially change the law upon which the judgment was based, a Rule 60(b) motion is not untimely if it is made within a "reasonable" time although the time for appeal has expired.

In an opinion and order dated July 16, 1976, the District Court, in response to this Court's decision in *Acha v. Beame*, 531 F.2d 648 (2d Cir., 1975) and the decision of the Court of Appeals in *Evans v. United Air Lines*, 534 F.2d 1247 (7th Cir., 1976), held (A. 310):

"There being no just cause for delay, partial summary judgment is granted as to the seniority status of the 38 female former police officers who took the October, 1969 exam and received a grade of 87% or higher. Rule 54(b), Fed. R. Civ. P."

Judgment thereon was entered on August 4, 1976 stating in relevant part (A. 317-18):

"ORDERED AND ADJUDGED that the defendants be and the same are hereby directed and ordered to fix

and set the seniority of each of the 38 members of the class at a date no later than May 8, 1970, said seniority date to govern all applicable current and future terms, conditions, benefits and fringe benefits of employment . . .; *provided, however, the right or entitlement, if any, of any of the 38 members of the class to displace or 'bump' a present incumbent and/or to back pay and/or to retroactive pension contributions into the Police Pension Fund shall be deferred for future determination or resolution; and it is further*

* * *

ORDERED that all other aspects of the relief sought by plaintiffs not hereinbefore disposed of shall be and the same are hereby deferred for future resolution or determination." (emphasis ours).

The effect of the judgment was to grant 38 class members constructive seniority to a date *not later than* May 8, 1970. That seniority date was subject to further modification after hearings before the Special Master. Additionally, as set forth in the judgment, itself, the District Court did not determine the entitlement of the 38 class members to any further relief based upon their claim that the layoffs were discriminatory. It specifically deferred determination of the claims for back pay and retroactive pension contributions.

Certification under Rule 54(b) is only proper if the District Court has finally determined the entire claim for relief of a party and finds that there is no just cause for delay. A "claim for relief" has been defined as "the aggregate of operative facts which give rise to a right enforceable in the courts." *Original Ballet Russe, Ltd. v. Ballet Theatre, Inc.*, 133 F.2d 187, 189 (2d Cir., 1943);

Backus Plywood Corp. v. Commercial Decal, Inc., 317 F.2d 339, 340-341 (2d Cir. 1963), *cert. den.* 375 U.S. 879 (1963).

A judgment is not final and certification is improper if the District Court has only partially determined the relief to be granted upon a single claim. The decision of the Supreme Court in *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976), is dispositive upon the facts presented herein. There, the District Court certified, under Rule 54(b), a judgment solely on the issue of liability. The District Court had held that defendants' pregnancy policy violated Title VII but did not rule on plaintiffs' claims for an injunction, damages and attorneys' fees arising out of the Title VII violation.

The Supreme Court held (424 U.S. at p. 744):

"The order . . . constitutes a grant of partial summary judgment limited to the issue of petitioner's liability. Such judgments are by their terms interlocutory, see Fed. Rule Civ. Proc. 56(e), and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final' within the meaning of 28 USC §1291. See, e.g., *Borges v. Art Steel Co.*, 243 F.2d 350 (CA2 1957); *Leonidakis v. International Telecoin Corp.*, 208 F.2d 934 (CA2 1953); *Tye v. Hertz Driveurself Stations*, 173 F.2d 317 (CA3 1949); *Russell v. Barnes Foundation*, 136 F.2d 654 (CA3 1943)."

See also, *Rieser v. Baltimore & O.R.R.*, 224 F. 2d 198, 199 (2d Cir., 1955), *cert. den.* 350 U.S. 1006 (1956); *Aetna Cas. & Ins. Co. v. Giesow*, 412 F. 2d 469, 470 (2d Cir., 1968).

The District Court's labelling does not alter the essential nature of the partial summary judgment granted

herein. A Rule 54(b) certification does not render an interlocutory judgment final and appealable. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437-38 (1946); *McNellis v. Merchants National Bank*, 385 F. 2d 916 (2d Cir., 1967).

Since the partial summary judgment was not final but interlocutory, it was properly reviewable and subject to modification by the District Court at any time until the entry of final judgment. *John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82, 88 (1922); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F. 2d 858, 862 (5th Cir., 1970); *Cohn v. United States*, 259 F. 2d 371, 376 (6th Cir., 1958).

Assuming, arguendo, that the partial summary judgment could be considered final and properly certified pursuant to Rule 54(b), defendants' failure to prosecute an appeal therefrom did not bar the subsequent vacatur of the judgment pursuant to Rule 60(b) since the decisions of the Supreme Court in *International Brotherhood of Teamsters v. United States*, 97 S. Ct. 1843 (1977) and *United Air Lines v. Evans*, 97 S. Ct. 1885 (1977) changed the law upon which the District Court relied in granting the judgment.

A motion to vacate a final judgment or order pursuant to Rule 60(b) is addressed to the sound discretion of the District Court. *Title v. United States*, 263 F. 2d 28, 31 (9th Cir., 1959), *cert. den.* 359 U.S. 989 (1959). Since the District Court in this injunction action continued to exercise active jurisdiction over this suit and the judgment had only partially decided the claims of 38 of more than 400 class members, to refuse to reconsider the partial summary judgment would have constituted an abuse of discretion. Even if a final judgment on all the claims in this injunction proceeding had been entered, a motion to vacate the judgment because of a change in law would have

been appropriate. See *Systems Federation v. Wright*, 364 U.S. 642, 647 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

In *Theriault v. Smith*, 523 F. 2d 601, 602 (1st Cir. 1975), the United States Court of Appeals specifically held that a change in decisional law justifies modification of a final judgment.

Appellants have cited no case supporting their proposition that a final judgment cannot be vacated in view of a supervening change in law after the time for appeal has expired. The cited cases hold only that where no new circumstances or controlling change in the applicable law are alleged, a Rule 60(b) motion cannot be used to circumvent the failure to appeal.

For example, in *Wallace Clark & Co., Inc. v. Acheson Industries*, 394 F. Supp. 393 (S.D.N.Y. 1975), *aff'd* 532 F. 2d 846 (2d Cir., 1976), *cert. den.* 425 U. S. 976 (1976), the District Court denied plaintiff's motion pursuant to Rule 60(b) (5) and (6) since the motion asked for relief from a consent judgment in a *prior action* and the consent judgment had been entered into three years *after* the decision of the Supreme Court on which plaintiff grounded his motion.

Ackermann v. United States, 340 U.S. 193 (1950), did not involve a change in controlling law which justified relief from the judgment. Indeed, the petitioner did not allege any factor which had changed since the entry of judgment.

In *Polites v. United States*, 364 U.S. 426 (1960), the Court specifically did not reach the question of whether it would affirm *Ackermann* and refused to grant relief solely upon the determination that the intervening decisions were not controlling.

The other cases cited by the appellant are similarly distinguishable.

In his decision in July 1976, Judge Duffy expressly predicated the grant of partial summary judgment on the decision of this Court in the first *Acha* appeal and on the decision of the Seventh Circuit in *Evans v. United Air Lines*, 534 F. 2d 1247 (7th Cir. 1976). As will be shown in Point II *infra*, the decision of the Supreme Court in *Teamsters, supra*, issued May 31, 1977, rejects the holding of this Court on the prior appeal. Indeed, Justice Marshall in his dissenting opinion, specifically cites *Acha* as having been overturned. 97 S. Ct. at p. 1876, fn. 2. The decision of the Supreme Court in *Evans* issued the same day, reverses the holding of the Seventh Circuit upon which Judge Duffy relied in granting partial summary judgment. Two weeks after the Supreme Court rendered its decisions, on June 15, 1977, defendants submitted their motion for relief from the judgment. Defendants' motion for reconsideration of the partial summary judgment was made within a "reasonable" time as required by Rule 60(b) and was properly entertained by the District Court in the exercise of its discretion.

POINT II

A facially neutral seniority system which may perpetuate past discriminatory hiring practices does not violate Title VII or 42 U.S.C. §1983.

(1)

In its July 16, 1976 opinion, the District Court granted plaintiffs' motion for partial summary judgment and injunctive relief on behalf of 38 class members. The Court

found that those 38 women, each of whom had taken Examination No. 9081 for the position of Policewoman given October 25, 1969, would have been appointed to the position of Police Trainee, based on their age and test score, on May 8, 1970, but for their sex. In granting the plaintiffs' motion, the Court denied the defendants' motion for summary judgment which had urged that: (1) the layoffs were immunized from challenge by §703(h) of Title VII since the underlying discriminatory hiring practices occurred prior to the effective date of Title VII in 1972; and (2) even assuming, arguendo, that the discriminatory hiring practices continued after the effective date of Title VII to the date plaintiffs were hired in 1973, their claim was barred by the applicable 300-day statute of limitations set forth in 42 U.S.C. §2000e-5(e) and laches.

In denying defendants' cross-motion and granting partial summary judgment, the District Court relied exclusively on the opinion of this Court on the initial appeal in this matter and the decision of the Seventh Circuit in *Evans v. United Air Lines*, 534 F.2d 1247 (7th Cir. 1976).

This Court held in *Acha* (531 F.2d 648 at p. 655):

"Until the past discrimination against these plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered 'bona fide' and in fact represents a continuation of past intentionally discriminatory practices, and thus falls outside the terms of section 703(h)."

This Court also stated (531 F.2d at p. 654):

"If a female police officer can show that, except for her sex, she would have been hired early enough

to accumulate sufficient seniority to withstand current layoffs, then her layoff violated section 703(a) (1) of Title VII, 42 U.S.C. §2000e-2(a)(1), since it is based on sexual discrimination."

In *Evans*, supra (cited by plaintiffs in support of their motion for summary judgment) the Seventh Circuit had held that the facially neutral seniority system which perpetuated the effect of prior discriminatory acts was itself in violation of Title VII. It further held that the failure of United to credit plaintiff with constructive seniority to remedy the past discrimination constituted a continuing wrong and therefore her claim was not barred by the statute of limitations.

Based on those two decisions, Judge Duffy held that the layoffs were discriminatory themselves and that plaintiffs' underlying allegations of discrimination were continuing in nature and therefore not barred by the statute of limitations or laches. In finding a continuing violation, Judge Duffy rejected defendants' contention that the alleged underlying discriminatory hiring practices occurred prior to the amendment of Title VII in 1972 and therefore Title VII could not be applied retroactively to remedy the pre-Act discrimination.

On May 31, 1977, the Supreme Court issued a decision in *United Air Lines v. Evans*, 97 S.Ct. 1885 (1977), reversing the decision of the Seventh Circuit relied upon by Judge Duffy in granting partial summary judgment. On the same day, the Supreme Court issued a decision in *International Brotherhood of Teamsters v. United States*, 97 S.Ct. 1843 (1977), vacating 517 F.2d 299 (5th Cir. 1975), which effectively reverses the ruling of this Court in *Acha*. The two decisions mandated the vacatur of the partial summary judgment granted herein and the subse-

quent orders of the District Court which granted certain class members constructive seniority.

In both cases, it was alleged, as here, that facially neutral seniority systems perpetuated the effects of past discrimination (both pre-Act and post-Act discrimination), that such seniority systems "locked in" the effects of the past discrimination, that the past discrimination therefore constituted continuing wrongs and thus the seniority systems were not "bona fide" within the meaning of Section 703(h) of Title VII. The Supreme Court rejected the claims of plaintiffs in each instance.

In *Teamsters*, the Court specifically considered "whether §703(h) validates otherwise bona fide seniority systems that afford no constructive seniority to victims discriminated against prior to the effective date of Title VII . . ." 97 S. Ct. at p. 1861.

The Court found that the seniority system in *Teamsters* did operate disproportionately to the advantage of whites and to the disadvantage of negro and Spanish-surnamed employees "who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act." *Id.* The Court stated, however (p. 1862):

"This disproportionate distribution of advantages does in a very real sense 'operate to freeze' the status quo of prior discriminatory employment practices." [*Griggs v. Duke Power Co.*, 401 U.S. 424]. But both the literal terms of §703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them."

The Court further stated (p. 1863):

"In sum, the unmistakable purpose of §703(h) was to make clear that *the routine application of a bona seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater seniority rights than negroes.* Although a seniority system inevitably tends to perpetuate the effect of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. . . . But our reading of the legislative history compels us to reject the government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be "bona fide. . . . It would place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discrimination without seniority. The consequence would be a perversion of the congressional purpose. We cannot accept the invitation to disembowel §703(h) by reading the words "bona fide" as the government would have us do. Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.

The language of the Supreme Court quoted above is directly applicable to the instant case. The partial summary judgment granted by the District Court was predi-

cated upon the finding that the layoffs were the result of the application of an otherwise neutral seniority system which perpetuated the effects of pre-Act discrimination.*

The Court in both *Evans* and *Teamsters* further considered the applicability of Title VII to a facially neutral seniority system which perpetuates the effects of prior post-Act discrimination. The Court held in both instances that Section 703(h) immunizes a neutral seniority system which perpetuates post-Act discrimination where

* Upon defendants' motion for vacatur of the partial summary judgment, etc., plaintiffs alleged for the first time that the layoffs were not the result of an "otherwise neutral" seniority system. They alleged, contrary to the allegations in the complaint and amended complaint, that the positions of Patrolman and Policewoman were not merged for all purposes in 1973 into the position of Police Officer (A. 522, 536, 569). The layoffs from a single seniority roster of males and females was allegedly not required by Section 80 of the Civil Service Law but was an independent discriminatory act under Title VII and 42 U.S.C. §1983. Plaintiffs' allegations raised substantial issues of fact and have been left open for trial by the District Court even though these new facts were never alleged in the complaint before the EEOC.

In view of the fact that these allegations were not raised before the District Court on the original motion for summary judgment and therefore did not form the basis for the judgment, they are irrelevant to whether or not the vacatur of the judgment was proper in light of *Teamsters* and *Evans*. The allegations have not been decided by the District Court and should not be litigated in the first instance in the Court of Appeals as appellants appear to urge. The appropriate place to prove allegations of intentional discrimination is in the District Court and neither Judge Duffy nor we dispute their right to have that opportunity. We can only conclude that appellants have cluttered their brief and the record with these matters in a deliberate attempt to blur the very narrow and single issue before the Court to hide the lack of substantive arguments to be made on their behalf.

the underlying discriminatory act was not made the basis of a timely charge in the E.E.O.C. under 42 U.S.C. §2000e-5(e). Therefore, assuming, arguendo, that the defendants discriminated against plaintiffs herein until they were hired in 1973, plaintiffs failed to file charges as required by the applicable statute, within 300 days after the occurrence of the "discriminatory" acts and are therefore barred from challenging the application of Section 80 of the Civil Service Law which resulted in their layoff on June 30, 1975.

In *Teamsters, supra*, the Court noted (97 S. Ct. at p. 1861 at fn. 30):

The legality of the seniority system insofar as it perpetuates post-Act discrimination nonetheless remains at issue in this case. . . . Our decision today in *United Air Lines v. Evans, post*, at —, is largely dispositive of this issue. *Evans* holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee. . . . *Section 703(h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination* (emphasis ours).

In *Evans*, the Court first pointed out that (97 S. Ct. at p. 1888, fn. 9):

Respondent cannot rely for jurisdiction on the single act of failing to assign her seniority credit for her prior service at the time she was rehired, for she filed her discrimination charge with the Equal Employment Opportunity Commission on February 21, 1973, more than one year after she

was rehired on February 16, 1972. The applicable time limit in February, 1972, was 90 days, effective March 24, 1972, this time was extended to 180 days.

...

The Court then held that, even had Evans filed a charge within 90 days after the date of her rehire, her claim still would have been time barred.

"Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by §705(d). *A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.* It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, *it is merely an unfortunate event in history which has no present legal consequences . . . United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present 'violation' exists.*" 97 S.Ct. at p. 1889. (emphasis supplied).

In summary (p. 1890):

. . . a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against

the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitation. Such a result would contravene the mandate of §703(h).

Here, the named plaintiffs, Acha and Egan, filed charges with the EEOC on June 25, 1975. They had each taken Examination No. 9081 given October 25, 1969 and had been appointed to the Police Department in May and June, 1973, respectively, two years prior to the filing of charges (A. 30, 34). Therefore, even assuming, arguendo, that plaintiffs were the victims of discrimination until the date they were hired, in that after the effective date of Title VII males were appointed before females with higher examination scores, they did not file timely charges in the EEOC under 42 U.S.C. §2000e-5(e). Thus the District Court lacks jurisdiction to consider such claims of hiring discrimination.* The failure to assign plaintiffs constructive seniority at the date of hire to remedy pre-Act discrimination and plaintiffs' allegations that in 1972 and 1973, males were appointed before females with higher test scores have no more legal significance than the pre-Act policy of administering separate examinations for the positions of Policewoman and Patrolman-Police Trainee.

Accordingly, the District Court properly vacated the partial summary judgment and subsequent orders granting plaintiffs constructive seniority. The judgment and

* Even though the claims of hiring discrimination set forth by the named plaintiffs are barred by the statute of limitations, the District Court has not dismissed the claims of the class, but is permitting plaintiffs to attempt to prove that any class member was the victim of hiring discrimination within 300 days prior to June 25, 1975, the date the named plaintiffs filed charges with the EEOC.

orders were predicated upon the holding that routine application of an otherwise neutral seniority system which perpetuated the effects of the pre-Act administration of separate examinations for males and females constituted a new and independent cause of action under Title VII. In accordance with *Teamsters*, the District Court properly vacated the judgment and orders on the grounds that the layoffs do not constitute a discriminatory act, since an otherwise neutral seniority system which perpetuates the effects of pre-Act discrimination is immunized from challenge under §703(h) of Title VII. Additionally, the administration of separate examinations, occurring prior to the effective date of the Act, has no legal significance and is not remediable under Title VII. In accordance with *Evans*, the District Court held that the layoffs were immunized from challenge under §703(h) of Title VII even though they may have perpetuated the effect of defendants' post-Act hiring practices. The Court ruled that plaintiffs' cause of action occurs when a male is hired in place of a female with a higher examination score. Such discriminatory act must have occurred within 300 days prior to the date the named plaintiffs filed charges in the EEOC. If any class member can demonstrate a live cause of action, relief is limited to constructive seniority to a date no earlier than March 24, 1972. Since none of the 61 class members who have already been reinstated based on constructive seniority dates awarded herein nor the 11 class members on whose behalf plaintiffs sought constructive seniority and injunctive relief had demonstrated that they were the victims of hiring discrimination after the effective date of the Act and within 300 days prior to June 25, 1975, the District Court properly modified the injunctions previously granted and denied injunctive relief to the additional 11 women.

This Court recently applied the decisions of *Teamsters* and *Evans* in *Cates v. Trans World Airlines*, Slip Op. 5127, Dkt. No. 76-7420 (2d Cir., August 5, 1977). In *Cates* the three plaintiffs alleged that TWA had initially refused to hire them because of racial discrimination. They were each thereafter hired. Subsequently TWA was forced to lay off employees for financial reasons. Under the "last-hired, first-fired" policy, two of the plaintiffs were laid off. Approximately two years later they filed charges in the EEOC and a year later plaintiffs commenced an action in the District Court alleging that the initial refusal to hire and the layoffs were discriminatory. They alleged, as here, that the layoffs perpetuated the effect of the prior hiring policies, and that the failure to credit them with constructive seniority at the date of hire constituted a continuing wrong. The District Court dismissed the second amended complaint holding that plaintiffs failed to state a live cause of action under either Title VII or 42 U.S.C. §1981.

This Court affirmed the dismissal of the complaint stating in relevant part (slip opin., at pp. 5144-45):

After *Evans* and *Franks*, the second amended complaint cannot be construed as alleging "two distinct unlawful employment practices." In fact, only one unlawful employment practice was alleged—discriminatory refusal to hire—and that was long since time barred. What was characterized as a second independent violation of Title VII, the seniority claim, was nothing more than the residual effect of a prior discriminatory refusal to hire, which could have been remedied had that past unlawful employment practice been timely asserted and proven.

As in *Franks*, the underlying wrong which appellants challenge is not a racially discriminatory se-

niority system but an allegedly racially discriminatory hiring system which has not functioned since at least 1970. They make no charges of current discrimination or that the seniority system is not bona fide or even operated in other than a neutral fashion. Their only claim is that appellants occupy a lower spot on the seniority list than they rightfully should because of the perpetuation of prior discrimination.

Under *Evans*, this does not charge a present violation of Title VII. Nor does the fact that present disadvantages arising from past discrimination crystallized in layoffs for Cates and George trigger a new period within which charges may be filed, as the district court believed. Cates and George stand in the same position as Whitehead, and, since the neutral seniority system here was insulated from attack by §703(h), can only point to the initial refusal to hire as a violation of Title VII. Because such claim was not asserted in a timely fashion by any of the appellants . . . it has no present legal significance.

See, also, *McMonigle v. Delta Air Lines*, 556 F. 2d 1261, 1263 (5th Cir., 1977).

Similarly, on June 21, 1977, this Court applied these principles to a case involving the same public employer and the same layoffs challenged in *Acha*. In *The Guardian Association of the New York City Police Department v. Civil Service Commission of the City of New York, et al.*, Dkt. No. 77-7145 (2d Cir., June 21, 1977), this Court reversed and remanded for further proceedings in light of *Teamsters*. In *Guardian* minority police officers were seeking constructive seniority back to the date of the examination which they challenged as being discriminatory.

(2)

In the face of this Court's decision in *Guardian, supra*, the decision of the Supreme Court in *Hazelwood School District v. United States*, 45 U.S.L.W. 4882 (June 27, 1977), citing *Teamsters* with approval as against municipal employees without qualification, and the fact that public and private employment cases have always been cited interchangeably, appellants nevertheless argue that *Teamsters* and *Evans* are not applicable to public employees. They contend that the 1972 amendment to Title VII which included §703(h) was not intended to immunize seniority systems which perpetuate pre-Act discrimination since discrimination by a public employer was always prohibited by the Fourteenth Amendment and 42 U.S.C. §1983. Understandably, appellants cite no case in support of their contention.

The argument is an attempt to take those parts of Title VII and 42 U.S.C. §1983 which plaintiffs find most palatable, discarding those they dislike, and tack them together to create a right and a remedy. However, nothing in the legislative history of the Title VII amendments supports the attempted bifurcation. Rather, the amendment was simply intended to give public employees the same rights and duties as those extended to private employees in 1955. Public employees are subject to the same limitations of the Act as are those in the private sector. Certainly, Congress did not intend in 1972 to afford public employees with vested seniority rights less protection than that afforded private employees in 1965. Had Congress intended such result, it would have eliminated the section 703(h) exemption from the amendment.

The Court in *Teamsters* specifically stated that (p. 1864 at fn. 39): "[t]he legislative history of the 1972 amendment to Title VII . . . in no way points to a different re-

sult . . . and the assumption of the authors of the Conference Report that 'the present case law would continue to govern the applicability and construction of Title VII, . . . of course does not foreclose our consideration of that issue.'*

Additionally, appellants' argument ignores the holding of the Supreme Court in *Evans*. There the Court stated that a facially neutral seniority system is immunized from challenge under §703(h) even if it perpetuates the effect of post-Act discrimination. Thus, if §703(h) immunized a neutral seniority system which perpetuates the effects of post-Act discrimination, it certainly immunizes a neutral seniority system which perpetuates the effects of acts allegedly discriminatory under 42 U.S.C. §1983 and which occurred prior to the effective date of Title VII.

The decisions in this Circuit are unanimous in holding that the 1972 amendment to Title VII extending the Act to municipalities does not retroactively apply to discrimi-

* Justice Marshall, in his opinion in *Teamsters*, in which he concurred in part and dissented in part, stated that the majority opinion had overruled the holdings in a number of cases including this Court's decisions in *Acha v. Beame*, 531 F. 2d 648 (2d Cir. 1976) and *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir., 1971), 97 S.Ct. at p. 1876, fn. 2. It is noteworthy that Justice Marshall urged with the majority that if §703(h) was intended by Congress to have any significance it must be construed to immunize a facially neutral seniority system in public or private employment. Justice Marshall stated that §703(h) should not immunize a departmental seniority system. Thus on the precise issue presented to this Court on this appeal, all nine Supreme Court Justices agree with the position of Judge Duffy.

nation occurring prior to 1972.* See *Monell v. Department of Social Services of the City of New York*, 532 F. 2d 259 (2d Cir. 1976), cert. granted 45 U.S.L.W. 3508 (Jan. 25, 1977); *Popkin v. New York State*, 547 F. 2d 18 (2d Cir., 1976); *Weise v. Syracuse University*, 522 F. 2d 397 (2d Cir., 1976); *Melani v. Board of Higher Education*, 73 Civ. 5434 (S.D.N.Y., June 18, 1975) (Gagliardi, J.).

(3)

In an attempt to avoid the application of *Teamsters* and *Evans* herein, appellants present several factual issues, each of which has been specifically referred for trial by the District Court because of the substantial factual disputes involved. These matters are not properly before this Court at this time and appellants may not litigate them in the first instance in this forum.

The first of these issues concerns plaintiffs' allegations, raised for the first time after two years of litigation upon defendants' motion to vacate the partial summary judgment, that the use of a merged seniority list for male and female police officers for the purpose of determining the order of layoff was not mandated by Section 80 of the New York Civil Service Law. Appellants contend that the layoffs were not the result of a "bona fide" neutral seniority system but were the product of a seniority system which had "its genesis in discrimination" thus falling outside the protection afforded by Section 703(h) of Title VII. As we noted *infra* at pp. 15, 30-31, this argu-

* *Brown v. General Services Administration*, 507 F.2d 1300 (2d Cir. 1974) is inapposite. It concerns the 1972 amendment extending Title VII to federal employees. The Supreme Court affirmed on other grounds, 425 U.S. 820 (1976), specifically noting that the issue of retroactivity of the amendment was not before the Court.

ment is predicated upon appellants' new claim that the positions of Patrolman and Policewoman were not merged for all purposes in 1973. This claim is contrary to the allegations in the original (A. 10) and first amended complaint (A. 147) and is controverted by substantial evidence in the record (A. 270, 484, 542, 546). However, the District Court has permitted plaintiffs to attempt to prove the allegations at trial. Assuming, *arguendo*, that plaintiffs ultimately prove their claim, they would not be entitled to relief in the form of constructive seniority. Rather, they would have demonstrated that the layoffs should have been made from separate seniority rosters from which proportionate numbers of males and females should have been laid off, based on their actual seniority dates. Appellants have nowhere demonstrated which class members would have thus been laid off and which would have withstood the layoffs.

Next, appellants argue that their allegations of hiring discrimination are not barred by the 300-day statute of limitations since the "effective filing date with the EEOC on behalf of the class was September 11, 1973, when Alice McCain filed her EEOC complaint." (Appellants' Brief at p. 49). Defendants were first apprised of the fact that Ms. McCain, a class member, had filed a charge of discrimination in 1973 with the EEOC in the rebuttal affidavit of plaintiffs' counsel submitted in opposition to defendants' motion to vacate the partial summary judgment. It appears that Ms. McCain was called for her pre-appointment medical examination in September, 1973, at which time she was seven months pregnant. She requested that her medical examination be postponed until six weeks after the birth of her baby. There was apparently a misunderstanding between Ms. McCain and the medical section concerning the postponement and, on September 11, 1973, Ms. McCain filed a complaint with the EEOC

alleging sex discrimination in that she was being denied appointment because she was pregnant, while males, she believed, were appointed although they suffered temporary disabilities. Sometime prior to February 6, 1974, Ms. McCain was rescheduled and appeared for her medical examination and the processing of her application resumed. She was appointed to the Police Department on March 25, 1974. Neither the EEOC nor Ms. McCain pursued her complaint after April, 1974 until recently when plaintiffs' attorney obtained a "right to sue" letter on behalf of Ms. McCain and the second amended complaint was filed after the institution of this appeal joining Ms. McCain as a named plaintiff (AD. 75-77). The determination of the timeliness and viability of the McCain amendment has been deferred by the District Court so that defendants can investigate the matter and raise the appropriate defenses thereto, including statute of limitations, laches and mootness.

Similarly, appellants argue in their Brief, pp. 52-53, that permanent injunctive relief should have been granted to the 72 affected class members even if the District Court was correct in the application of *Teamsters* and *Evans*. They allege that the test scores and appointment dates of those class members as compared with males who were appointed on January 29, 1973 (the first date on which appointments were made after the job freeze was lifted) demonstrate that each of the 72 class members is entitled to a constructive seniority date of January 29, 1973. However, as is indicated by appellants' lack of references to the Appendix and Record filed on this appeal, neither the test scores of the class members nor the appointments of the males are facts which appear anywhere in the record in this case. In fact most of the information has been produced by the plaintiffs since the institution of this appeal and none of it was presented to the District Court

in opposition to defendants' motion to vacate the partial summary judgment. Once again, the issue of whether any individual class member was the victim of hiring discrimination in 1973-74 was referred for trial by the District Court in the very order from which the plaintiffs appeal. Furthermore, all of the appointments of males on January 29, 1973 were from lists established from examinations given prior to the exam the plaintiffs took in 1969. No males from Examination No. 9080 given the same day the class members took Examination No. 9081 were appointed until more than 200 females had been appointed. Three earlier male lists were recanvassed as part of a program to recruit minorities to the Police Department. Additionally, the appointments of the women may have been delayed because of problems encountered in their investigations (A. 542, 546; AD. 41, 71). These issues remain to be litigated.

(4)

Finally, appellants argue that even if the constructive seniority and injunctive relief originally granted by the District Court are not available under Title VII in view of *Teamsters* and *Evans*, it was appropriate under 42 U.S.C. §1983. They contend that the District Court erred in modifying the permanent injunctions granted on behalf of the 61 class members who have already been reinstated and in denying a permanent injunction on behalf of the additional 11 class members. Appellants have an unfortunate tendency to discuss appropriate relief without first examining if they have a viable cause of action against any defendant.

In the first instance, appellants contend that although the seniority system and the resulting layoffs may be immunized under Title VII by virtue of §703(h), it was dis-

criminary under 42 U.S.C. §1983. The only case cited by appellants in support of this proposition is *Chance v. Board of Examiners*, 534 F. 2d 993 (2d Cir. 1976) ("*Chance IV*"). Indeed, appellants do not rely on the decision of this Court in *Chance IV* as much as they rely on the denial of the petition for certiorari therein by the Supreme Court, 45 U.S.L.W. 3806 (June 14, 1977).

Appellants' reliance on *Chance IV* is misplaced. It has consistently been held that Title VII and 42 U.S.C. §1983 must be read consistently. In *Waters v. Wisconsin Steel Works of Int. Harvester*, 502 F. 2d 1309 (7th Cir., 1974), *cert. den.* 425 U.S. 997 (1976), the Court, after concluding that the employment seniority system did not violate Title VII, stated:

"Having passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. §1981."

Id. at 1320, fn. 4. See also *Patterson v. American Tobacco Co.*, 535 F. 2d 257 (4th Cir. 1976); *Jersey Central Power and Light Co. v. Local Union, 327, I.B.E.W.*, 508 F. 2d 1309 (3d Cir. 1975), *cert. den.* 425 U.S. 998 (1976); *Watkins v. Steel Workers Local No. 2369*, 516 F. 2d 41 (5th Cir. 1975); *Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A.*, 501 F. 2d 622, 628-29, fn. 4 (2d Cir. 1974); *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission*, 482 F. 2d 1333, 1337 (2d Cir. 1973).

Indeed, in *Chance IV*, an action brought pursuant to Section 1981, this Court held (537 F. 2d at p. 998):

"That plaintiffs herein are proceeding under 42 U.S.C. §§1981, 1983 does not render defendants' seniority system any more susceptible to attack.

Congress has clearly placed its stamp of approval upon seniority systems in 42 U.S.C. §2000e-2. [Footnote omitted citing 42 U.S.C. §703(h)] Whether this section be considered a repeal by implication of any possible contrary construction of §1981, or simply a statement of guiding legal principles, we agree with the Court in *Waters*. . . .”

To the extent that *Chance IV* approved a grant of retroactive seniority under §1983, that approval was clearly predicated upon a construction of §703(h) of *Title VII* which is no longer viable under the decisions in *Teamsters* and *Evans*. Indeed, the denial of certiorari by the Supreme Court does not indicate a contrary result. Of course, a denial of certiorari is not an adjudication on the merits. *Brown v. Allen*, 344 U.S. 443, 491-92 (1953). See also Stern and Gressman, *Supreme Court Practice* §5.7 at p. 213. Additionally, the petition for certiorari sought to reopen a preliminary injunction granted six years earlier in light of *Washington v. Davis*, 426 U.S. 229 (1976) and was opposed by the defendant on the grounds that the claim was stale and should not be reopened at this time.

Furthermore, appellants' argument ignores the recent decision of this Court in *Cates, supra*. There, the plaintiffs brought their challenge to the seniority system and the layoffs both under *Title VII* and 42 U.S.C. §1981. After extensive discussion of plaintiffs' claims under *Title VII* and holding that the application of the seniority system was immunized by §703(h) of the Act, the Court concluded that “the operation of the seniority system at issue here does not constitute an independent violation of *Title VII* or § 1981” (Slip op. at p. 5148) and affirmed the dismissal of the complaint.

To the extent that appellants' predicate their argument upon the allegation that they were the victims of discrimination in defendants' hiring practices, appellants face severe timeliness problems as recognized by the District Court.

Since plaintiffs all took an examination for appointment to the Police Department no later than October 25, 1969, they are limited, under the three-year statute of limitations, in challenging in a federal action the exclusions of females from examinations administered prior to that date. See *Kaiser v. Cohn*, 510 F.2d 282, 284-85 (2d Cir., 1974).

Therefore, the District Court correctly concluded that those plaintiffs hired after June, 1972 (three years prior to the commencement of this action) who can demonstrate that a male was hired in the place of a qualified female with a higher test score state a timely cause of action under 42 U.S.C. §1983. Again, the District Court referred this issue for trial in view of the fact no class member had yet demonstrated that they were the victims of such discrimination.

The only defendants in this action are the City of New York, Mayor Beame, and Police Commissioner Codd. As the District Court held and plaintiffs did not dispute, the City of New York is not a "person" within the meaning of 42 U.S.C. §1983 and therefore no claim against it may be asserted under that section. See *Monroe v. Pape*, 365 U.S. 167 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Monell v. Department of Social Services of the City of New York*, 532 F.2d 259 (2d Cir., 1976), cert. granted 45 U.S.L.W. 3508 (Jan. 25, 1977).

Both Mayor Beame and Commissioner Codd assumed their respective offices in January, 1974. The bulk of the

plaintiff class herein had already been appointed to the Police Department. In fact, only about 35 women were appointed after that date and their appointments had generally been delayed because of significant problems in their investigations or similar difficulties (A. 546). These defendants are not chargeable with the acts of their predecessors. See *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 650, 622 (1974). None of the thirty five women appointed after January 1, 1974 have demonstrated that they were the victims of hiring discrimination during the term of the defendants, nor that the Mayor and the Police Commissioner "played [an] affirmative part in depriving any members . . . of any constitutional rights." *Rizzo v. Goode*, 423 U.S. 362, 377 (1976).

Therefore, appellants' allegations under 42 U.S.C. §1983 do not support their contention that the District Court erred in modifying and denying injunctive relief on behalf of the 72 class members at issue herein.

CONCLUSION

The order appealed from should be affirmed, with costs.

September 26, 1977.

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

ALLENTON JAMES being duly sworn, says that on the 26 day
of SEPT. 1977, he served the annexed PLIFFS BRIEF upon
MURRAY GORDON Esq., the attorney for the PLIFFS - APPLTS
herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the
United States in said city directed to the said attorney at No. 600 - 3RD AVE in the
Borough of MANH., City of New York, being the address within the State theretofore designated by
him for that purpose.

Sworn to before me, this

26 day of SEPT. 1977

Alleton James
BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Form 323-60M-1126054(77) 346